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No. 05-589

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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2005

GLEN WHORTON, Nevada Department of Corrections, et al., Petitioners,

v.

STEVEN WAYNE COLLIER, Respondent.

**On Petition For A Writ of Certiorari
To the United States Court Of Appeals
For The Ninth Circuit**

**BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

FRANNY A. FORSMAN
Federal Public Defender
For the District of Nevada
*JOHN C. LAMBROSE
Assistant Federal Public Defender
411 East Bonneville Avenue, Suite 250
Las Vegas, NV 89101
Telephone: (702) 388-6577

* Attorney of Record for Respondent

Glen Whorton, Nevada Department of Corrections, et al., Petitioners

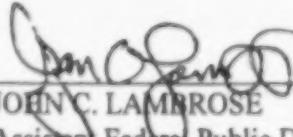
v.

Steven Wayne Collier, Respondent

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Respondent, Steven Wayne Collier, asks for leave to file the attached Brief In Opposition To Petition for Writ of Certiorari, without prepayment of costs and to proceed in forma pauperis. No affidavit is attached, inasmuch as the District Court appointed counsel for Petitioner under the Criminal Justice Act of 1964.

Respectfully submitted,



JOHN C. LAMROSE
Assistant Federal Public Defender
Counsel for Respondent

QUESTIONS PRESENTED

1. Whether The Affirmative Defense Of Procedural Default Is Imbued With Any Presumption Of Adequacy When It Is Alleged In A § 2254 Proceeding?
2. Whether, After The State Alleges The Affirmative Defense Of Procedural Default, The Question Of The Adequacy Of That Default Is Placed In Issue Upon The Prisoner's Assertion, Pursuant To The Rule In Ford v. Georgia, That The Default Rule Was Not Clear, Or Well-Established At The Time Of The Purported Default?
3. Whether This Court's Long-Standing Rule That The State Must Assert The Affirmative Defense Of Procedural Default Necessarily Includes A Requirement That The State Has The Burden Of Proof As To The Propriety Of The Asserted Default?

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STATEMENT OF THE CASE¹

A. The State Prosecution.

The Respondent (Collier) and a co-defendant Christopher Hammond ("Hammond") were charged in an eleven count information alleging various drug offenses ranging from possession of methamphetamine to possession with the intent to traffic in at least 28 grams of methamphetamine. Excerpts of Record (EOR) 146. The information was filed in the Second Judicial District Court in and for Washoe County (Reno) Nevada. *Id.* The offense conduct forming the factual basis for each of the eleven narcotics offenses was alleged to have occurred on the same day; March 12, 1994. *Id.* The information was filed in the trial court and was supported by the testimony of six witnesses who appeared at Collier's preliminary hearing. *Id.* at 33-67. Collier was represented by attorney Peter J. Sferrazza. *Id.*

Mr. Sferrazza began vigorously litigating Collier's case filing a myriad of compelling pretrial motions. See, e.g., Clerk's Record (CR) 15 (exhibits pertaining to pretrial motion practice). Pretrial litigation and sparring continued from June 1994 until January 13, 1995 at which time Mr. Sferrazza sought leave to withdraw because he would be beginning a job in the public sector.² CR 15 at Exh. 35. The trial court appointed the county public defender to represent Collier and on March 1, 1995 deputy public defender Joe Merkin ("Merkin") appeared as Collier's attorney at a status hearing continuing the trial. CR 15 at Exh. 45.

¹ Citations to the record will be referenced as they were in the Court of Appeals except for references to the record that have been included in the Petitioner's Appendix (P.App.).

² The trial court ruled in favor of the State on each of the several pretrial motions that were filed.

Collier, however, was unaware of the fact that Merkin's colleague at the public defender's office (Thomas Mitchell) was representing the state's premier cooperating witness, a man named Gary McConnell. See EOR 33-67 (McConnell's preliminary hearing testimony) and 68-135 (Court documents relating to McConnell's own drug prosecution.). McConnell testified that he was a known drug dealer with charges pending against him and that in exchange for his cooperation as an instrument of entrapping Collier for the State he would receive probation. Id. at pp. 22 and 26.³

Without knowledge of this serious conflict of interest, Merkin persuaded Collier to enter a guilty plea to an amended information May 17, 1995. EOR 147-160. Collier was represented by deputy public defender Chester Kafchinski ("Kafchinski") at this proceeding. Id. There was no written plea memorandum. According to the hearing transcript, Collier agreed to plead guilty to Possession Of Trafficking Quantity Of A Controlled Substance in violation of Nev. Rev. Stat. 453.3385 and 453.3405, a crime carrying a minimum penalty of ten years and a maximum penalty of life in prison.⁴ Id. Collier "stipulated" to a sentence of 45 years in prison. Id.

To add insult to injury Collier was represented by deputy public defender Mitchell at his sentencing hearing which occurred on July 5, 1995. EOR 161-167. Mitchell apparently never disclosed that he began representing McConnell (the government informant) in a major narcotics prosecution against him which began in January 1994. Id. 68-72. McConnell ultimately pled guilty to substantially reduced charges on February 15, 1994. EOR 103-120. Mitchell was at his side as

³ This Sixth Amendment deprivation of Collier's constitutional right to conflict-free counsel was pled as a sub-part to ground one of Collier's 28 USC § 2254 Amended Petition. EOR 17 and 18.

⁴ The plea colloquy shows that Collier never admitted to any facts to support his guilt nor did the trial judge explain each and every element of the crime to Collier. EOR 147-160.

counsel. Id. McConnell could only receive probation on the crime if he cooperated and on March 12, 1994 he did just that when he set up Collier and Hammond. Id. at 33-67.

McConnell was sentenced on March 23, 1994. EOR at 123. Again, Mitchell was at his side as counsel. Id. Unfortunately, the transcript was sealed, no doubt due to the fact that Mitchell was advising the court as to McConnell's cooperation in the Collier/Hammond prosecution. Id. Admittedly, this is conjecture but, until a more reasonable inference (or the transcript is unsealed) is presented it makes sense. In short, Mitchell appeared as counsel for the target (Collier) of his previous client's (McConnell) cooperation. Id.

The sentencing hearing went off without a hitch and Collier received a 45-year sentence. EOR 161-167. Codefendant, Hammond, received a sentence of ten years. Id. Collier's judgment of conviction was entered on July 5, 1995. P.App. K-1. Collier did not file a notice of appeal.⁵

Collier spent the next year and a half trying to get his file from the public defender's office and the State court. CR 15, Exh. 56(a)-(e). Eventually, on March 21, 1997 Collier filed a Motion To Correct Illegal Sentence, pursuant to Nev. Rev. Stat. 176.555, alleging that the judgment of conviction was deficient because it failed to reference the statutory citation for the offense of conviction. EOR 169-180. Without waiting for a response from the State, the trial judge made the correction and on March 26, 1997 filed what the court fashioned as an Amended Judgment of Conviction.⁶ P.App. J-1. Collier did not appeal from this Amended Judgment of Conviction.

⁵ These facts provide the basis of Collier's allegations set forth in Ground One of his § 2254 Amended Petition. EOR 14-21. Collier alleged that he was deprived of his constitutional right to a direct appeal from his conviction.

⁶ Collier filed a Notice of Appeal from his July 5, 1995 Judgment of Conviction on November 16, 1998, and the Nevada Supreme Court dismissed that appeal on jurisdictional grounds
(continued...)

On May 20, 1997, Collier filed another Motion To Correct Illegal Sentence, pursuant to Nev. Rev. Stat. 176.555 reasserting that the statute relevant to his offense of conviction was amended by the Nevada State Legislature on July 1, 1995 (four days prior to his July 5, 1995 sentencing) reducing the range of punishment from 25 years (minimum) to Life (maximum) to 2 years (minimum) to 15 years (maximum).⁷ EOR 183-192. This time the trial court denied relief, on the merits, in a written order dated May 28, 1997.

Collier filed a timely appeal which was denied in an unpublished Order on May 13, 1999. P.App. H-1. The Nevada Supreme Court reached the merits and held as follows:

We conclude that appellant's contention lacks merit. At the time of appellant's offense in March 1994, NRS 453.3385(2) provided for a sentence of life or a definite term of not less than ten years. Appellant's forty-five year sentence was within the statutory limit. We recognize that NRS 453.3385(2) was amended in 1995 to reduce the penalty to a minimum term of two years and a maximum term of fifteen years. 1995 Nev. Stat., ch. 443, § 296, at 1288. However, that amendment became effective on July 1, 1995, and does not apply to sentences committed before that date.

Id. Remittitur issued in June 1997. EOR 251.

On May 28, 1999 Collier filed a Petition for Postconviction Relief alleging that his conviction and sentence were in violation of the United States Constitution. EOR 255-331. The State of Nevada filed a motion to dismiss Collier's action alleging that it was untimely under Nev. Rev. Stat. 34.726(1). Nev. Rev. Stat. 34.726(1) (emphasis added) provides, in part, as follows:

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⁶ (...continued)
in an unpublished Order entered on February 3, 1999. P.App. I-1.

⁷ Collier presented this argument in his first Motion To Correct Illegal Sentence but the trial court did not rule on that aspect of his Motion. See EOR 169-180 and P.App. J-1.

Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the supreme court issues its remittitur.

The state trial court entered a written order finding in favor of the State and concluded that Collier's 1999 postconviction action was untimely. EOR 335. Collier filed a Notice of Appeal (pro se) and on January 11, 2001 the Nevada Supreme Court entered an unpublished opinion affirming the district court. P.App. G-1. The Court held as follows:

Appellant filed his petition approximately four years after entry of the judgment of conviction and one and one-half years after entry of the amended judgment of conviction. Thus, appellant's petition was untimely filed. See NRS 34.726(1). Appellant's petition was procedurally barred absent a demonstration of cause for the delay and prejudice. See id.

In an attempt to demonstrate cause for the delay, appellant argued that he was deprived of a direct appeal because his trial counsel failed to inform him of his right to appeal. Based upon our review of the record on appeal, we conclude that the district court did not err in determining that appellant failed to demonstrate sufficient cause to overcome his delay. See Harris v. Warden, 114 Nev. 956, 964 P.2d 785 (1998); Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

Id.

B. The § 2254 Proceedings In The Federal District Court.

On June 30, 2000 Collier filed an Amended § 2254 Petition setting forth the following two grounds for relief:⁸

Ground One: Collier was denied his Sixth and Fourteenth Amendment rights to the effective assistance of counsel when counsel failed to consult with him regarding his right to an appeal and failed to file a notice of appeal on his behalf.

⁸ Ground One included seven sub-parts. EOR 1-23.

Ground Two: The trial court denied Collier his right to equal protection and due process of law under the Fifth and Fourteenth amendments when it accepted his guilty plea and sentenced him without advising him of his right to an appeal.

GOR 1-23. The Petitioner filed a motion to dismiss arguing that the grounds were both unexhausted. Id. 360. The district court entered an interim order finding ground one and its sub-parts to be exhausted but concluded that ground two was unexhausted. P.App. F-1. Collier abandoned ground two and the Petitioner was ordered to file an Answer. Id. 392.

The Petitioner filed an Answer to ground one asserting that it was not cognizable because it had been decided on adequate and independent state law grounds. EOR 395. The Petitioner cited the district court to the January 11, 2001 Nevada Supreme Court opinion dismissing Collier's state postconviction relief action. Id. See also P. App. G-1. The Petitioner argued that, since the highest state court concluded that Collier had violated the one year rule set forth in Nev. Rev. Stat. 34.726(1), ground one was procedurally defaulted. Id.

Collier filed legal briefing arguing that the Nevada default rule was not adequate because, under the unique circumstances of his case, it was not clear that he had, in fact, violated the rule.⁹ EOR 407-430. Collier began by contending that the trigger date for the one year rule set out in Nev. Rev. Stat. 34.726(1) started on March 26, 1997 - the date that the amended judgment of conviction was filed. Id. at 413. He went on to argue that, the May 20, 1997 Motion to Correct Illegal Sentence action tolled § 34.726(1)'s one year deadline and that since that action was pending until the Nevada Supreme Court's June 9, 1999 (decision denying relief on the merits), the state

⁹ Collier entitled this pleading as follows: "Petitioner's Legal Brief On Procedural Default And Request To Refashion Currently Pending 2254 Petition As A Request To Issue Writ Of Auditor Querela." EOR 407-429.

habeas action (filed on May 28, 1999) was timely. Id. Finally, Collier concluded by asserting as follows: "Thus, the State has not, and will not, be able to meet its burden of demonstrating the procedural bar at issue is sufficiently adequate to bar federal merits review." Id. 415. Collier also argued that cause and prejudice existed to overcome the default.

The Petitioner did not respond to Collier's briefing on this question. Instead, the Petitioner elected to move to strike Collier's brief. CR 41. Over four months after Collier's unanswered challenge to the adequacy of the alleged default, the district court ruled in favor of the Petitioner. P.App. E-1. The district court did not rule on the Petitioner's motion to strike but did acknowledge Collier's briefing on the question of the propriety of the purported default. P.App. E-4 ("The court has thoroughly reviewed the facts of this case and has considered carefully all of the legal points and authorities presented by petitioner and respondents.") The district court went on to summarily reject Collier's arguments regarding adequacy and cause and prejudice. Id.

Collier appealed and sought a certificate of appealability from the district court on April 24, 2003. EOR 445. Collier argued, in part, that the procedural default was not adequate and that the Petitioner failed to prove otherwise. Id. 448. The district court rejected Collier's argument but did concede that "jurists of reason" could come to a different conclusion as to whether Nevada law clearly barred federal review of Collier's claim. P.App. C-5 and 6. The district court granted a Certificate of Appealability on the following two questions:

1. That the procedural bar applied by the Nevada Supreme Court and relied upon by this court is inadequate to foreclose federal review.

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2. That Petitioner made an adequate showing of cause and prejudice to overcome the procedural bar.

Id. C-7

C. The Proceeding In The Court Of Appeals

The gravamen of Collier's argument on appeal to the Ninth Circuit was that the Nevada default rule precluding federal review of his § 2254 claim was not clear or well-established and, therefore, not adequate as defined by this Court's decision in Ford v. Georgia, 498 U.S. 411 (1991). Collier argued, in part, as follows:

The procedural rule invoked to preclude federal review in this case states that a "challeng[e] to the validity of a judgment **or sentence**" needs to be filed within a year of the judgment or if there was an appeal within a year of remittitur. Nev. Rev. Stat. 34.726(1) (emphasis added). That is precisely what happened in this case. This defeats the State's contention that application of 34.726 under these circumstances is adequate to foreclose federal review.

Collier recognizes Nevada Revised Statutes 34.726(1) has been found to be adequate by this Court in a case with an unrelated procedural history. Moran v. McDaniel, 80 F.3d 1261, 1269 (9th Cir. 1996). Nevertheless under the unique circumstances of this case the rule cannot be deemed adequate. See Lee v. Kemna, 534 U.S. 362, 364 (2002). Collier, a pro se litigant, could reasonably have believed a Motion to Correct an Illegal Sentence tolled 34.726 because such a Motion arguably "challenges the validity of a judgment or sentence." At the time of Collier's purported default, no clear precedent from the Nevada Supreme Court existed foreclosing the type of post conviction/sentencing litigation Collier pursued. This state of ambiguity renders application of the state default inadequate to foreclose federal review. Cf. Ford v. Georgia, 498 U.S. 411, 423-24 (1991).

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There was no clear and concise rule, in Nevada, which precluded Collier from challenging an Amended Judgment of Conviction with a Motion To Correct An Illegal Sentence and upon completion of that challenge commence a state habeas action within one year. Nev. Rev. Stat. 34.726(1) did not preclude that plan of attack and the Nevada Supreme Court had not construed that statute in the procedural context of this case at the time of Collier's purported default. For the reasons stated, the procedural default invoked by the court below was not adequate. Ground One should be heard on the merits.

Appellant's Opening Brief (AOB) at 13-15. The Petitioner took the position that Nevada law was clear on this question and that, as a matter of federal law, the default imposed by the Nevada Supreme Court was adequate. Respondent's Answering Brief (RAB) at 14-16.

On June 3, 2005 the Court of Appeals entered a published opinion reversing the district court holding as follows:

The Nevada procedural rules applied by the Nevada state courts to bar Collier's habeas petition are not adequate to preclude federal review of his habeas petition. The rules applying Nev. Rev. Stat. 34.726(1) were not clear, consistently applied, and well-established at the time of Collier's purported default. When Collier filed his motion to correct an illegal sentence in 1997 and subsequent habeas petitions, it appeared under state law a habeas petition could follow a remittitur from such an appeal and amended judgment. The district court's opinion is reversed and the appeal is remanded for consideration on the merits.

Collier v. Bayer, 408 F.3d 1279, 1288 (9th Cir. 2005), see also P.App. A-1.¹⁰ The Petitioner's request for rehearing and en banc review was denied on August 9, 2005.

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¹⁰ The Court of Appeals did not reach Collier's alternative argument that cause and prejudice existed to overcome the purported default. 408 F.3d at p. 1280.

ARGUMENT SUMMARY

It is well-settled that a federal court cannot hear a challenge to a state court prisoner's conviction and sentence pursuant to § 2254 if the highest state court decided the question on an adequate and independent state law ground. In Collier's case the state rule was procedural in nature. This case turns solely on the question of adequacy and this Court has defined that term to mean a rule that was clear, well-established and consistently applied at the time of the prisoner's default. This Court has consistently held that the State must plead the affirmative defense of procedural default in a § 2254 action or risk waiving it as a bar to review of the prisoner's claim.

The Court of Appeals concluded that the rules applied by the Nevada Supreme Court to bar Collier's review of his state postconviction relief action were not clear or well-established and for that reason, could not preclude federal review. This conclusion was predicated upon, *inter alia*, Collier's contention that no clear rule existed and the Petitioner's inability to disprove that assertion. In other words, the Petitioner was unable to provide sufficient support for the assertion that the affirmative defense of procedural default was viable in Collier's case. The Petitioner failed to carry the day on this critical issue.

The Petitioner now seeks certiorari on three separate questions that are interrelated. Each question deals with the evidentiary nature of the affirmative defense of procedural default in § 2254 actions. None of the questions posed in the Director's Petition are worthy of review by this Court. This case was decided in Collier's favor because the default rule was not clear and well-established. Once the affirmative defense was asserted he simply needed to allege that no Nevada rule existed at the time of his default that could preclude review of his § 2254 claim. The Petitioner did not prove otherwise. Consequently, the very nature of this case does not easily lend itself to the subtle

nuances of the § 2254 evidentiary burden-shifting analysis inherent in the Petitioner's certiorari questions. Most importantly, because the Nevada procedural rules were not clear or well-established Collier would prevail in this Court no matter how the questions were resolved. In short, certiorari review on any or all of the proffered questions cannot effect the decision of the Court of Appeals given the unique nature of Collier's case.

Finally, each of the questions presented have been resolved by this Court in previous cases. First, there is no presumption of adequacy or, for that matter independence, inherent in a state procedural default rule. Second, procedural default is a waivable affirmative defense that becomes a federal issue once it's adequacy and/or independence is challenged by a § 2254 petitioner. Finally, the burden of proof regarding the viability of the affirmative defense of procedural default always remains with the party asserting that defense. That will always be the State in a § 2254 action. The Fifth Circuit's eccentric rule ascribing the burden to the prisoner is not supported by any case decided by this Court. The Fifth Circuit is all alone on this evidentiary point but Collier submits that the circuit split resulting from this is not important enough to warrant review by this Court, especially given the unique nature of Collier's case, i.e., Collier would prevail under either version of the circuit split.

For the reasons stated below Collier respectfully asks this Court to deny the Petitioner's request for certiorari.

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REASONS FOR DENYING THE WRIT

A. Certiorari Review Of Any Or All Of The Questions Presented Would Not Change The Decision Of The Court Of Appeals.

This case turned on whether the Nevada procedural rules invoked to preclude federal review were adequate. Collier v. Bayer, 408 F.3d 1279, 1284 (9th Cir. 2005). Specifically, Collier argued that the rules were not clear or well-established at the time of his default. The Court of Appeals considered the adequacy of the state procedural rules in accordance with the analytical framework imposed by this Court's case law. 408 F.3d at 1283-84, citing Coleman v. Thompson, 501 U.S. 722, 729 (1991), Ford v. Georgia, 498 U.S. 411, 423-24 (1991), and Lee v. Kemna, 534 U.S. 362, 376 (2002). The Court of Appeals correctly concluded that at the time of Collier's purported default Nevada law was unclear and therefore, inadequate, as to whether an amended judgment restarts the § 34.726 one year clock¹¹ and whether the pendency of a Motion to Correct an Illegal Sentence tolls that clock. 408 F.3d at p. 1288.

The Court of Appeals generally supported this construction of federal law by noting that the Nevada Supreme Court did not clarify the confusion surrounding an amended judgment's effect on § 34.726(1)'s one year clock until September 3, 2004 when it decided Sullivan v. State, 96 P.3d 761, 764 (Nev. 2004). 408 F.3d at 1285. The Court also noted that the State of Nevada sought

¹¹ The Nevada Supreme Court evidenced this lack of clarity regarding amended judgments in its January 11, 2001 decision denying state habeas relief. P.App. G-3 “[Collier] filed his petition approximately four years after entry of the judgment of conviction and one and one-half years after entry of the amended judgment of conviction.”)(emphasis added). The federal district court’s order granting a COA implicitly assumed that the March 1997 amended judgment restarted the one year clock also. P.App. C-6 (The district court must have assumed that the amended judgment started the one year clock because the gravamen of the Court’s analysis dealt with whether the period of time between the amended judgment (March 26, 1997) and the pendency of the Motion To Correct An Illegal Sentence tolled the one year clock.).

publication of the Sullivan decision from the Nevada Supreme Court and inferred from that request a desire on Nevada's part to clarify the issue.¹² Id. at p. 1286 n.8 ("The cause for publication is not mentioned. Given the lack of guidance on this issue in prior opinions, the need for publication is consistent with the need to establish the rule.")(emphasis added).

The Court of Appeals continued its federal review of adequacy when it found that Nevada law did not clearly preclude the tolling of § 34.726(1)'s one year period during the pendency of a Motion To Correct An Illegal Sentence until the Nevada Supreme Court decided Dickerson v. State, 967 P.2d 1132, 1133-34 (Nev. 1998). 408 F.3d at p. 1287. The Court of Appeals noted the Nevada Supreme Court's holding in Dickerson: "We now construe [Nev. Rev. Stat.] 34.726(1) to mean that the one year period for filing a postconviction habeas corpus petition begins to run from the issuance of the remittitur of a timely direct appeal to this Court from the judgment of conviction or from the entry of the judgment of conviction if no appeal is taken. A timely direct appeal is one in which the notice of appeal is filed with the district court within the time period prescribed statute." Id. quoting Dickerson v. State, 967 P.2d at 1133-34 (emphasis added and in original). Since the Dickerson decision was a new rule established in 1998 it could not operate Collier's purported default which occurred prior to that rule.

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¹² It should be noted that the Washoe County District Attorney sought publication in Sullivan and that same office prosecuted Collier.

The Petition for Certiorari did not explain that nature of the Collier decision. Instead, it superficially asserted that both of the above rules were clear and well-established at the time of Collier's purported default. This assertion falls flat. A review of this Court's analysis in Ford v. Georgia, 498 U.S. 411, 423-24 (1991) supports the decision of the Court of Appeals. This Court observed as follows:

In any given case, however, the sufficiency of such a rule to limit all review of a constitutional claim itself depends upon the timely exercise of the local power to set procedure. "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457-458, 78 S.Ct. 1163, 1169-1170, 2 L.Ed.2d 1488 (1958). In the NAACP case, we declined to apply a state procedural rule, even though the rule appeared "in retrospect to form part of a consistent pattern of procedures," because the defendant in that case could not be "deemed to have been apprised of its existence." *Id.*, at 457, 78 S.Ct., at 1169. In James v. Kentucky, 466 U.S. 341, 104 S.Ct. 1830, 80 L.Ed.2d 346 (1984), we held that only a "firmly established *424 and regularly followed state practice" may be interposed by a State to prevent subsequent review by this Court of a federal constitutional claim. *Id.*, at 348-351, 104 S.Ct., at 1835-1837.

Id. (emphasis added).

The Petitioner contends, without providing much analysis, that Nevada's rules were sufficiently clear to preclude federal review and that the panel's decision conflicted with Ninth Circuit precedent. Petition at p. 14 citing Bargas v. Burns, 179 F.3d 1207, 1211 (9th Cir. 1999). The Court of Appeals obviously concluded that Ford v. Georgia controlled this question when the full court rejected the Petitioner's request for en banc review. P.App. B ("... no judge has requested a vote on whether to hear the matter en banc.").

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Collier submits that the two Nevada rules found to be inadequate by the Court of Appeals were so unclear as to render that conclusion indisputable. Consequently, should this Court grant certiorari on any one of the three proffered questions no matter how the Court decided the respective issue the result in this case would be the same; Collier would prevail. This Court need not waste its time rendering advisory opinions. See generally Colorado v. Nunez, 465 U.S. 324, 327-28 (1984)(Stevens, J., concurring).

B. This Court Has Never Cloaked The Affirmative Defense Of Procedural Default With A Presumption Of Adequacy.

This Court has long held that procedural default is an affirmative defense that can be waived if not properly asserted. Gray v. Netherland, 518 U.S. 152, 165-66 (1996) ("because procedural default is an affirmative defense for the Commonwealth . . . the Commonwealth would have been obligated to raise procedural default as a defense or lose the right to assert the defense thereafter."). The Petitioner contends that Dugger v. Adams, 489 U.S. 401, 410 n.6 (1986), Harris v. Reed, 489 U.S. 255, 262-265 (1989), and Johnson v. Mississippi, 486 U.S. 578, 587 (1988) "suggests" that state procedural rules must be presumed adequate. Petition at pp. 9 and 10. Not one of these cases stand for such a suggestion. The only consistent theme running through these cases is that a state rule is adequate if it is clear, well-established and consistently applied and that determination is a question of federal law.

The Petitioner correctly observes that the Fifth Circuit presumes adequacy.¹³ Sones v. Hargett, 61 F.3d 410, 416 (5th Cir. 1995) citing Harris v. Reed, 489 U.S. at p. 262. A careful review

¹³ However, the Petitioner's assertion that the Fourth, Smith v. Dixon, 14 F.3d 956, 972 (4th Cir. 1994) and Seventh, Prihoda v. McCaughtry, 910 F.2d 1379, 1384 (1990), Circuits "appear to find such a presumption" is simply wrong. Petition at p. 10. A close inspection of each of those cases does not reveal even an "appearance" of such a proposition.

of the Harris decision at page 262, specifically, or anywhere in the opinion, generally, does not reveal support for this rogue presumption. Harris simply holds that if the highest state court decides a case on both the merits and procedural grounds, if the procedural ruling is clear, it will operate as an adequate bar to federal review. Dugger and Johnson are simply cases that illustrate how federal courts are to analyze the question of adequacy when it is called into question by the prisoner. See generally 489 U.S. at p. 410 n.6 and 486 U.S. at p. 587.

This Court has never held that a federal court must presume adequacy when a procedural default is alleged and the Fifth Circuit's eccentric contrary conclusion is difficult to fathom. Nevertheless, under the unique facts of this case Collier would clearly prevail; even under the Fifth Circuit's presumption matrix. 61 F.3d at p. 416-17 (noting the relative ease at which a prisoner is able to rebut the "presumption"). This question is not worthy of review.

C. **The Adequacy Of A Procedural Default Is Placed In Issue Once A Prisoner Alleges That The Rule Was Not Clear Or Well-Established At The Time Of The Default.**

The above statement is not ground-breaking. It simply recites this Court's jurisprudence on this issue at least since Coleman v. Thompson, 501 U.S. 722 (1991) was decided. Procedural default is an affirmative defense that must be raised or it will be waived. Gray v. Netherland, supra. The Tenth Circuit put some context to how the analysis should work when the consistent application and regularly followed prong of the adequacy requirement is at issue. In Hooks v. Ward, 184 F.3d 1206, 1217 (10th Cir. 1999) the court fleshed out a logical burden-shifting procedure. Once the affirmative defense of procedural default was alleged by the State the prisoner would then be obliged to place the adequacy of the rule in question through "specific allegations" challenging the federal viability of the defense. Id. The court concluded that the ultimate burden

of proof should, in all fairness, remain with the State (party asserting the defense). *Id.* See also Cannon v. Gibson, 259 F.3d 1253, 1273 n.20 (10th Cir. 2001) (the state bears the ultimate burden of proving a procedural default is adequate).

The Ninth Circuit adopted this burden-shifting procedure in Bennett v. Mueller, 322 F.3d 573, 586 (9th Cir. 2002);

Once the state has adequately pled the existence of an independent and adequate state procedural ground as an affirmative defense, the burden to place that defense in issue shifts to the petitioner. The petitioner may satisfy this burden by asserting specific factual allegations that demonstrate the inadequacy of the state procedure, including citation to authority demonstrating inconsistent application of the rule. Once having done so, however, the ultimate burden is the state's.

The Bennett court observed that the Tenth Circuit's reasoning (burden should be on the moving party and generally the State is at an advantage because the prisoner is pro se) was persuasive and that the process would ensure fairness. *Id.* at 585-86. This burden-shifting procedure is consistent with this Court's desire to ensure that the federal court's scrutiny of adequacy is deliberate, thorough, and fair taking into consideration both respect for comity and the consequences at stake for the prisoner. See generally, Coleman v. Thompson, *supra*.

The upshot is that once the affirmative defense of procedural default is pled the prisoner need only assert specific factual or legal allegations to support his contention that the default rule is not adequate.¹⁴ Collier certainly satisfied that obligation both in the district court, see EOR 412-415, and on direct appeal. See AOB at pp. 12-15. In fact, Collier cited the district court to the Ninth Circuit's decision in Bennett v. Mueller, *supra*. See EOR 415.

¹⁴ At least one trial court has found this "step two" obligation assigned to the prisoner to be a "modest" one. Dennis v. Brown, 361 F.Supp. 2d 1124, 1130 (N.D. Calif. 2005).

The Petitioner, as discussed earlier, did not respond with any facts or legal argument after Collier placed adequacy in issue in the district court. Nevertheless, the Petitioner now disingenuously complains that "Collier did not allege any specific factual allegations or cite to any cases where the Nevada Supreme Court failed to apply NRS (sic) 34.726 consistently, so that one could conclude that NRS (sic) 34.726 was not 'well-established.'" Petition at p. 16. The Petitioner is wrong for two reasons. First, Collier did allege, with specificity, that the default rules were not clear and well-established. He did it in the district court. He also did it in the Court of Appeals. The Petitioner's contrary assertion misrepresents the record. Second, Collier did not need to prove that the rules were not consistently applied as a condition precedent to alleging they were not clear and well-established. The Petitioner simply does not understand the law of procedural default. The Court of Appeals (majority opinion) made this point in response to the dissent as follows:

The dissent argues that the petitioner must cite cases in which a procedural bar is applied inconsistently. Dissent at 6245. Inconsistency is only one aspect of the principle that a state's procedural bar must be adequate. This court has repeatedly said the state's rule must be clear, consistently applied, and well-established. See e.g., Robinson v. Ignacio, 360 F.3d 1044, 1052 (9th Cir. 2004); Melendez v. Warden, 288 F.3d 1120, 1122 (9th Cir. 2002); Jackson v. Calderon, 211 F.3d 1148, 1153 (9th Cir. 2000). The emphasis in the case before us is whether the rule was well-established. We, obviously, do not require a habeas petitioner to show inconsistency in application when the problem with the rule is that the rule is not clear or well-established and has never been applied to the unique circumstances of this case.

408 F.3d at p. 1484 n.5 (emphasis added).

Collier certainly satisfied any obligation he may have had to challenge the adequacy of the purported default rules. This question is not worthy of certiorari review.

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D. The Burden Of Proving The Adequacy Of A Procedural Default Always Remains With The Party Asserting That Default.

Both the Tenth and Ninth Circuits have construed this Court's habeas jurisprudence to require a rule that places the burden of proving that a default is adequate on the party asserting the procedural default as an affirmative defense. Hooks v. Ward, 184 F.3d 1206, 1217 (10th Cir. 1999); Bennett v. Mueller, 322 F.3d 573, 585 (9th Cir. 2003). The Second Circuit has not squarely reached the issue but will, in all likelihood, follow the Tenth and Ninth Circuit's reasoning. Cotto v. Herbert, 331 F.3d 217, 238 (2d Cir. 2003) ("Because the procedural bar is a defense to a habeas claim, we assume without deciding that the state bears the burden of proving the adequacy of the state procedural rule.").

The Fifth Circuit stands alone on this question and, without providing any of the analysis set out by the Tenth Circuit, requires the prisoner to assume the burden of proof. Stokes v. Anderson, 123 F.3d 858, 860 (5th Cir. 1997). The Stokes court cited to an earlier Fifth Circuit decision entitled Sones v. Hargett, 61 F.3d 410, 416 (5th Cir. 1995). The Sones decision found a presumption of adequacy existed in all procedural defaults but that the prisoner could rebut the presumption "in certain circumstances." 61 F.3d at pp. 416-17. The Sones decision relied on Harris v. Reed *supra* for this presumption theory but did not expressly find that the prisoner had the burden of proof. *Id.* Later, in Stokes v. Anderson, *supra*, the Fifth Circuit, citing to Sones expressly placed the burden on the petitioner. 123 F.3d at p. 860. Neither decision provided any rationale for this odd conclusion and, more importantly, made no attempt to reconcile their decision with this Court's contrary jurisprudence.

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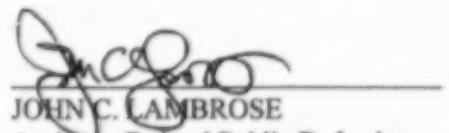
The Petitioner urges this Court to grant certiorari on this question because it "presents the opportunity to resolve" the circuit split caused by the Fifth Circuit's odd rule. Petition at p. 13. The split does not present the sense of urgency heralded by the Petitioner. Even though the Fifth Circuit arrived at the wrong conclusion the question simply need not be resolved under the unique facts of Collier's case. The case does not lend itself to a proper vetting of the merits of the Tenth Circuit's conclusion that the burden always rests with the State because this is not a consistent application case. Further Collier would win under either standard. Review is not warranted on this question.

CONCLUSION

Collier respectfully asks that this Court deny the Petition For Writ Of Certiorari.

Dated this 30th day of January, 2006.

Respectfully submitted,



JOHN C. LAMBROSE
Assistant Federal Public Defender
Office of the Federal Public Defender
411 East Bonneville Avenue
Suite 250
Las Vegas, Nevada 89101
(702) 388-6577

CERTIFICATE OF SERVICE

GLEN WHORTON, Nevada Department of Corrections, et al.,

Petitioners,

v.

STEVEN WAYNE COLLIER,

Respondent.

CV-N-99-0641-ECR(RAM)
(Reno, Nevada)

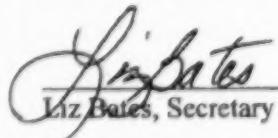
CA No. 04-15017

The undersigned hereby certifies that she is an employee in the office of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on January 30, 2006, she served a copy of the attached Brief in Opposition to Petition for Writ of Certiorari by personally placing a copy in the United States mail, postage paid to the addressees named below:

Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

David K. Neidert
Senior Deputy Attorney General
Criminal Justice Division
5420 Kietzke Lane, Suite 202
Reno, Nevada 89511
(775)850-4110



Liz Bates, Secretary